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RELIGION AND DEMOCRACY

Steven Shiffrin*

Should citizens armed with religious reasons for public policy outcomes present those reasons in the public forum or otherwise rely on them in making decisions? Those questions have produced a flurry of scholarship, both within and outside of the law. Moreover, as Kent Greenawalt's work richly demonstrates, these related questions raise many more questions still. Do the answers to those questions differ, for example, if the citizen is a judge, a legislator, a columnist, a religious leader, or a "mere" voter? Are some religious reasons acceptable for presentation in a public forum, but not others?¹

* Professor of Law, Cornell University. I am honored to be a part of this celebration of the work of Kent Greenawalt. His prolific work is invariably thoughtful, careful, and rigorous. It is a special pleasure, albeit daunting, to address the subject of religion and democracy in this connection. As Sandy Levinson observes, Professor Greenawalt has more than led the way: "Greenawalt is surely among the most distinguished contributors, as both philosopher and lawyer, to the general debate about liberalism and religion and, more specifically, about the extent to which membership in a liberal polity presupposes the exclusion of certain kinds of arguments from the public realm." Sanford Levinson, *Abstinence and Exclusion: What Does Liberalism Demand of the Religiously Oriented (Would Be) Judge?*, in *RELIGION AND CONTEMPORARY LIBERALISM* 76, 80 (Paul J. Weithman ed., 1997).

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1 See generally KENT GREENAWALT, *PRIVATE CONSCIENCES AND PUBLIC REASONS* (1995). Those who argue for restrictions (of an informal nature) typically make it clear that they do not mean to restrict remarks made in institutions such as universities and churches (except for the endorsement of candidates in churches). They have in mind statements addressed to the public for the purposes of political justification. Because I argue for the most part against such restrictions, I need not worry about what is inside and what is outside the public forum. I will use the term political or public forum or political debate to refer to remarks addressed to the public for the purposes of political justification.

If one holds a constricted view of legal scholarship, the pursuit of these questions by legal scholars might seem odd. No one is contending that religious speech be banned. Instead, in most contexts, the claim is merely that the introduction of religious argument is uncivil, a type of political bad manners. But the debate is quite lively even in those contexts where no one seriously contends that an Establishment Clause issue exists. The debate, however, has important implications for free speech theory, for liberal theory, and for our understanding of the role of religion in a democratic society.

Although it is fruitful to attack these questions with particular attention to discrete and varying contexts, I aim for the most part to paint with a broad brush² and to argue that the literature is overly critical about the role that religious speech may properly play in dem-

2 Accordingly, I will, for the most part, ignore considerations of role. I will also, for the most part, ignore a wide variety of positions that would restrict the religious argument in political life, but in a less broad fashion than I posit in the text. For example, Kent Greenawalt maintains that neither columnists nor legislators should advance religious arguments or arguments based on comprehensive philosophical positions in the political forum, but that citizens are morally free to vote on such bases and legislators, more than judges and executive officials, should be permitted to give some weight to the comprehensive positions of their constituents in arriving at their decisions. *See id.* at 156–62. Robert Audi takes the position that religious arguments, at least for restricting conduct, should not be presented in the political sphere unless there is a sufficient and adequate accompanying secular rationale and motivation. *See* Robert Audi, *The State, the Church, and the Citizen*, in RELIGION AND CONTEMPORARY LIBERALISM, *supra* note * (author's note), at 38, 55–58. Lawrence Solum argues that religious arguments should not be presented in the political sphere unless they are accompanied by secular arguments that meet particular requirements. *See* Lawrence B. Solum, *Constructing an Ideal of Public Reason*, 30 SAN DIEGO L. REV. 729, 747–53 (1993). John Rawls has maintained that no comprehensive position, whether or not religious, should be advanced to justify “‘constitutional essentials’ and questions of basic justice” with certain exceptions. JOHN RAWLS, POLITICAL LIBERALISM 214 (1993) [hereinafter RAWLS, POLITICAL LIBERALISM]. In later writing, he has suggested that comprehensive doctrines may be advanced regarding constitutional essentials and questions of basic justice so long as sufficient political reasons are also provided. *See* JOHN RAWLS, POLITICAL LIBERALISM li–lii (paperback ed. 1996) [hereinafter RAWLS, Paperback]; John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 783–84 (1997). On the other hand, Rawls would not permit actors in the political public forum to attack the comprehensive doctrines of others except to the extent that such doctrines are “incompatible with the essentials of public reason and a democratic polity.” *Id.* at 766. Finally, Robert Lipkin argues that there is a “conceptual antipathy” between the “American communitarian republic” and certain forms of nondeliberative religions. Robert Justin Lipkin, *Religious Justification in the American Communitarian Republic*, 25 CAP. U. L. REV. 765, 785 n.59 (1996). As I read his work (*see infra* notes 15 and 35), Lipkin argues that the deep structure of American constitutionalism and democracy make some religious arguments uncivil in political life. I think this argument is at odds with our history. On the other hand, I believe Lipkin

ocratic life.³ In particular, I will criticize the arguments that it is *unfair* to use religious arguments and that religious arguments are *dangerous*, whether because they lead to political instability or reactionary politics.⁴ In painting with a broad brush, I do not mean to suggest that religious arguments are always appropriate in democratic life. In some contexts, the Establishment Clause should be interpreted to prevent the use of such arguments. I do not believe, for example, that judges should resort to religious arguments in their opinions or that legislatures should use religious arguments in their whereas clauses.⁵ On the other hand, I maintain that participants in political debate, be they religious leaders, columnists, or commoners, may appropriately use religious argument. Neither democratic theory, as I argue in the first two Parts of the Article, nor the Establishment Clause, as I argue in the final Part of the Article, should counsel against such participation.

impressively argues for the value of deliberative modes of discourse and admirably contrasts deliberative approaches to discourse with "dedicated" approaches.

3 Some of the writing would extend beyond religious arguments to arguments that entertain particular conceptions of the good life. See, e.g., BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); CHARLES LARMORE, *PATTERNS OF MORAL COMPLEXITY* (1987); THOMAS NAGEL, *EQUALITY AND PARTIALITY* 154-68 (1991); JOHN RAWLS, *A THEORY OF JUSTICE* (1971); Ronald Dworkin, *Liberalism, in PUBLIC AND PRIVATE MORALITY* 113-43 (Stuart Hampshire ed., 1978). These scholars believe that the state should not promote particular conceptions of the good life. I assume that they would also maintain that it would be uncivil for a citizen to advocate that the state do so, but they are not all explicit on the point.

4 I will ignore the contention that a religious perspective is false. The bulk of the literature does not rely on that contention in any event. But see, e.g., Brian Barry, *How Not to Defend Liberal Institutions*, in *LIBERALISM AND THE GOOD* 44-45 (R. Bruce Douglass et al. eds., 1990); Suzanna Sherry, *Enlightening The Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 473 (1996) (charging most of the major religions in the United States with irrationality). No one in the literature goes quite as far as Sigmund Freud who, in referring to traditional views of the afterlife and prayer, remarked, "The whole thing is so patently infantile, so foreign to reality, that to anyone with a friendly attitude to humanity it is painful to think that the great majority of mortals will never be able to rise above this view of life. It is still more humiliating to discover how large a number of people living today, who cannot but see that this religion is not tenable, nevertheless try to defend it piece by piece in a series of pitiful rearguard actions." SIGMUND FREUD, *CIVILIZATION AND ITS DISCONTENTS* 22 (1961). He thinks that religion has some benefit, however: "[B]y forcibly fixing [people] in a state of psychical infantilism and by drawing them into a mass-delusion, religion succeeds in sparing many people an individual neurosis." *Id.*

5 The same conclusion should follow (though it is a closer case) if a legislator's comments are formally part of the legislative history. By contrast, religious arguments by government officials or columnists (to mention a strong and specific disagreement I have with Professor Greenawalt) are appropriately introduced into political debate.

Although I will deal with the fairness argument at some length, I should state at the outset that I have little patience with that aspect of the debate. Much of the literature is focused on how people should speak to one another in an imaginary well-ordered society—a utopian society that we do not now have and that I believe we never will have.⁶ I believe we live in an unjust society. Consequently, we should not be entertaining excessively precious conceptions of respect, nor should we be assuming that instability is necessarily a bad thing.⁷ We should instead be fostering dissent,⁸ and we should be recognizing that religious dissent has much to contribute to the creation of a more progressive society.

I. UNFAIR?

Is it unfair to use religious arguments in political debate? One line of argument goes like this: because pluralism is a central fact of our democratic society, it is vital that forms of public reason be acceptable to reasonable people of differing philosophical or religious per-

6 This criticism does not apply to Greenawalt's work. He argues that most of his prescriptive conclusions comport with the current traditions of discourse. Although I disagree with many of his conclusions, it would simply be wrong to suggest that he is focusing on a utopian ideal.

7 In this respect, I am a considerable distance away from the concerns of John Rawls. Rawls's move away from RAWLS, *A THEORY OF JUSTICE*, *supra* note 3, to RAWLS, *POLITICAL LIBERALISM*, *supra* note 2, was motivated by the concern that the just society he proposed would be unstable. See RAWLS, *Paperback*, *supra* note 2, at xv–xvii. He seems to be concerned that the threat to stability might come from those who hold reasonable comprehensive doctrines, for example, followers of John Stuart Mill. See *id.* I find this implausible. It is true that believers in other reasonable comprehensive doctrines, for example, followers of John Stuart Mill, liberal utilitarians, and the like might disagree with the Kantian foundations of the regime, but the basic structure of the political regime would be well within the range of the reasonable for them. Any fights over what comprehensive doctrine to unite behind would be ideological struggles leading to the same basic structure. This is not an instability to worry about.

To the extent stability might genuinely be threatened, the sources would likely be those who hold doctrines that Rawls would regard as unreasonable, particularly those who desire unreasonably unequal distributions of wealth.

Of course, Rawls is working in the area of ideal theory. He recognizes that the issue of how to get to a just society is a “long-term political reform . . . project to be carried out.” RAWLS, *Paperback*, *supra* note 2, at 398. But he thinks a necessary step in that analysis is to know the ideal society that you would like to steer society towards. I think such theorizing can be helpful, though not always necessary, to guide political action. On the other hand, as I subsequently argue, such theorizing can also get in the way. See CATHARINE MACKINNON, *FEMINISM UNMODIFIED* 219 (1987).

8 For support of this contention, see IAN SHAPIRO, *DEMOCRACY'S PLACE* 234–42 (1996); STEVEN SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* ch. 4 (1999).

suasions. People have a right to be treated with equal respect and concern. If sanctions are imposed on the basis of philosophical or religious orientations that a person of a different orientation could reasonably reject,⁹ then the basis for a liberal society dissolves, and the sanctions are illegitimate.

The first problem with this argument is that it is one-sided.¹⁰ The argument privileges those who are tolerant and ready to meet others halfway.¹¹ For the toleration-minded of many different persuasions, a requirement that one be restricted to arguments that assume no comprehensive view, religious or otherwise, may be perfectly compatible with their own comprehensive views. It may be a sensible compromise in meeting others halfway. But, to take a standard problem with the argument, consider the religious person, call him John, who thinks that abortion is immoral because a soul exists from the moment of conception and who believes it therefore follows that the state must prevent abortions lest the innocent be killed. One obvious response to John might be to argue that his position is wrong (wrong about the soul or wrong about the connection between the existence of the soul *vel non* and the proper role of the state) and that he, therefore, ought not present it. The argument we are considering, however, is altogether more sweeping. The argument is that John should refrain from presenting his position *even if his position is entirely correct*.¹²

9 Some go further and argue that limits on liberty are not justified unless the person burdened could not reasonably reject the *reasons* given, as opposed to the orientation buttressing the reasons, for the limitation. This approach produces a hefty libertarian bias. It blinks either at the ordinary unavailability of such reasons in a pluralistic society or at the liberty denying effects of the market or both. Alternatively, it necessitates a rather robust conception of reason. Others would argue that limits on certain liberties are indefensible in the absence of a basic structure of society that no one could reasonably reject. This is either anarchistic or necessitates building the theory into the concept of reason.

10 Of course, in some sense, any position on the civility of religious intervention in political life would have discriminatory effects, if followed. See Michael McConnell, *Christ, Culture, and Courts: A Neibuhrian Examination of First Amendment Jurisprudence*, 42 DEPAUL L. REV. 191 (1992) (exploring different stances taken by churches on the church-state relationship and the implications of the case law regarding those positions).

11 See RAWLS, POLITICAL LIBERALISM, *supra* note 2, at 157.

12 See Joshua Cohen, *A More Democratic Liberalism*, 92 MICH. L. REV. 1503, 1539 (1993) ("[W]e regard it as unreasonable to impose political power on others in the name of values that they reasonably reject—even if those values are correct."); see also NAGEL, *supra* note 3, at 157–58. Although Nagel does not address the question, Cohen and Rawls have applied this principle to the abortion example. See *infra* note 13; see also Larry Alexander, *Liberalism, Religion, and the Unity of Epistemology*, SAN DIEGO L. REV. 763, 771 n.26 (1993). Larry Alexander forcefully argues that liberals cannot

So understood, this argument is hard to credit. To ask John to accept the notion that he should be tolerant about killing or that he should meet people halfway is to ask that he compromise his moral values in significant ways. John might well take the position that a state that protects some human lives, but not others (by permitting abortions), is illegitimate. In response, some liberals try to evade this difficulty by characterizing John's position not merely as something with which they disagree or as something which they think is wrong, but as "unreasonable."¹³ They suggest that only reasonable views are appropriately presented in the public forum. But this move ties the fate of liberalism to an ill-defined conception of reason. To my mind, liberalism has at least as much to do with what we value as with how we reason. The turn toward reason seems reductive and overstated. I say this not to side with those who would use the state to prevent abortions. In my view, the problem with those who argue that the state should intervene to prevent abortions, whether or not their views are religiously based,

make good on this general principle. If Alexander is correct, liberals would need to argue that anti-abortionists are wrong, not that their range of arguments should be restricted in the public forum. *See id.*

13 I think John Rawls was guilty of this. *See* RAWLS, *POLITICAL LIBERALISM*, *supra* note 2, at 243 n.32 (discussing abortion). *But see* RAWLS, *Paperback*, *supra* note 2, at lv-lvii (modifying his position, but suggesting any Catholic who would revolt, as opposed to merely protesting, against a failure to criminalize abortion would be unreasonable). In defending Rawls's initial position, Joshua Cohen writes,

Given the complexities of the question of the status of the fetus, the conscientious rejection by many citizens of the claim that due respect for human life requires that we treat the fetus as a human person in the first trimester, the weight of the equality of women as a political value, and the importance of justification to others when such weighty values are at stake, how could it be reasonable to urge the state to endorse and to enforce the view that due respect for human life bars first-trimester abortions? Someone who rejects first-trimester abortions may reply that when it comes to preventing the murder of innocent babies, right is more important than being reasonable. But that reply concedes the point about reasonableness, which is the only issue I am now addressing.

Cohen, *supra* note 12, at 1539. Of course, *that* reply does concede the reasonableness point. But a Catholic might deny the complexities of the status of the fetus and argue that the other factors, though admittedly weighty, are not weighty enough to justify the denial of respect for human life. This may be wrong, but it is a large step to say it is unreasonable except on a definition of reasonableness that *requires* accommodation in controversial situations (the going halfway theory). That definition of reasonableness may be necessary to have a working theory of political liberalism, but it trades on an underinclusive conception of reason.

is that they are wrong on the merits, not that they commit the offence of incivility in presenting their views in the public forum.¹⁴

Second, the assumption that arguing from premises that non-religious persons could not accept denies them equal respect and concern is questionable.¹⁵ You and I might have different philosophical and religious views, and I may seek to capture the state to enact legislation based on my views, but all that shows is that I disagree with you. It does not show that I lack respect for you as a person.¹⁶

14 Abortion is perhaps the most difficult case for this variety of liberalism, but the objection applies to more garden variety conservative positions as well. To take another similar example, suppose John believes for religious reasons that the consumption of obscene material is immoral and that its public distribution debases our public morality. John may also feel that to compromise these views is itself immoral. To characterize John's view as "unreasonable" for its unwillingness to compromise is altogether too fast. This is not to endorse either of the hypothesized views; it is rather to say that toleration may look "reasonable" from the perspective of the liberal state and "unreasonable" from the perspective of many millions of people whose views, albeit controversial, should not automatically be deemed beyond the pale.

"That there are views that reject one or more democratic freedoms is itself a permanent fact of life, or seems so. This gives us the practical task of containing them—like war and disease—so that they do not overturn political justice." RAWLS, *POLITICAL LIBERALISM*, *supra* note 2, at 64 n.19. Despite the harshness of this language, Rawls cannot be fairly read to recommend the combating of conservative undermining of democratic freedoms by restricting their free speech or by any other undemocratic means.

15 The argument is sometimes made that the United States has a firm cultural commitment to the principle that people are owed equal concern and respect or are free and equal. Rawls in particular must make an argument like this because his political liberalism does not permit him to argue from any comprehensive doctrine. But the truth is that persons are regarded as free and equal in this culture except to the extent that they are not because of racism, sexism, homophobia, classism, or what have you. See Robert Justin Lipkin, *In Defense of Outlaws: Liberalism and the Role of Reasonableness, Public Reason, and Tolerance in Multicultural Constitutionalism*, 45 DEPAUL L. REV. 263, 291 n.117 (1996); Steven Shiffrin, *Liberal Theory and the Need for Politics*, 89 MICH. L. REV. 1281, 1286–87 (1991). Never mind that the cultural basis (for better or for worse) for regarding people as free and equal is quite arguably religious. For the contention that the defense of human rights depends upon a religious perspective, see MICHAEL J. PERRY, *LOVE AND POWER* 36–41 (1991).

See Thomas Nagel's argument, *supra* note 3, for a limited public sphere of argument and that the legitimacy of coercion depends upon an allegiance to Kantian political principles. His argument might appeal to those who accept those principles, but conservatives, not to mention many liberals, do not. His description of many who disagree with him as fanatics appears substantially overinclusive. See NAGEL, *supra* note 3, at 168.

16 For commentary on the contention that respect demands that the state may impose sanctions based on differing conceptions of what the right is, but not based on differing conceptions of what is the good life, see Steven Shiffrin, *Liberalism, Radicalism, and Legal Scholarship*, 30 UCLA L. REV. 1103 (1983). Of course, the state may not

Indeed, the failure to present my real views may itself show you lack of respect.¹⁷

To be sure, you may think that the legislation is immoral, but so long as my views do not result in the violation of rights,¹⁸ it is arguably intolerant of you to suggest that they do not belong in the political thicket. Of course, it can be claimed that one has a right to live in a society that makes decisions without relying on comprehensive views one opposes. Indeed, this claim underwrites the conclusion that a society making such decisions is illegitimate. As I have suggested, however, the strategy is too easily turned on its head: for many, a society that is not responsive to their comprehensive views is illegitimate. More narrowly, many might contend that a fair society is one that allows differing comprehensive views to compete in democratic politics.¹⁹ In addition, the illegitimacy claim is not easily cabined: if a society is illegitimate because it relies on comprehensive views I reject, why is it not illegitimate when it relies on non-comprehensive views I deeply resent?

Reliance on religious arguments is also claimed to be unfair because they are regarded as inaccessible to a broad range of the public. This argument privileges some religions over others, relies on an eccentric definition of accessibility, and makes dubious assumptions about the role of speech in a democratic society.

The accessibility argument privileges some religions over others because many religions reach conclusions relevant to the political realm without resort to the Bible (or other theological sources) and by processes of reasoning that are nontheological in character.²⁰ The

impose sanctions in the name of religion, but as is discussed in text accompanying notes 44–64, that does not rule out much religiously motivated legislation.

17 See MICHAEL J. PERRY, *RELIGION IN POLITICS* 59, 64–65 (1997); Michael Sandel, *Political Liberalism*, 107 HARV. L. REV. 1765, 1794 (1994) (book review). The same problem plagued earlier attempts to suggest that fairness demands that citizens not take their conception of the good into account in arguing for the basic structure of the society. See RAWLS, *supra* note 3. The idea was that fairness was justice. This approach, however, presupposed that it was necessary to be fair to everyone's conception of the good, which was the very point in dispute. The question, however, could not reasonably be begged or avoided by being smuggled into the original position or saved for later imaginary conversations with Bruce Ackerman. See Kai Nielsen, *The Choice Between Perfectionism and Rawlsian Contractarianism*, 6 INTERPRETATION 132 (1977); Shiffrin, *supra* note 16, at 1169. For Ackerman's argument, see ACKERMAN, *supra* note 3, at 255–61.

18 In Part III, *infra*, I discuss and reject the contention that religiously motivated legislation should be considered a violation of the Establishment Clause.

19 See generally PERRY, *supra* note 15.

20 For example, much writing by Thomas Aquinas relies on secular reason.

accessibility argument would not foreclose reliance on such arguments, but would foreclose arguments drawn from biblical interpretations. The argument supposes that "reason" is what secularists engage in and that religious followers abandon reason except for those religious believers who reason in the orthodox mode.

The "accessibility" approach also relies on an unusual conception of the term *accessible*. Suppose I maintain that God or an angel has appeared to me in a vision. This is inaccessible in the sense that you cannot *experience* the vision, but the claim that the vision occurred is certainly intelligible. Suppose my faith is that I believe in God, Jesus Christ as the son of God, and the Bible as the revealed word of God. Suppose I argue the Bible teaches that homosexuality is sinful or that the material inequality in this society and between this society and many other countries is condemned by God. In what sense would these arguments be inaccessible? Surely, a nonbeliever can understand the argument from the Bible and might be in a position to attempt to refute it. Participation in argument about how best to interpret the Bible need not require a belief in divine inspiration for that work or for its wisdom. A nonbeliever by definition would not share the theological assumptions, but the nonbeliever would not share the assumptions of many arguments made in public political life. Perhaps the point is that the theological assumptions are unavailable to the nonbeliever because he has not received the gift of faith or grace. But this is the way some believers might think of the situation; a nonbeliever is unlikely to believe in the "gift of grace."²¹ Moreover, on this line of thought, those believers who think they come to the

21 Abner Greene argues that reliance on inaccessible arguments "splits the citizenry into those who (by the believers' own terms) have current access to the truth and those who do not." Abner S. Greene, *Is Religion Special?*, 1994 U. ILL. L. REV. 535, 539. It is not clear why the believer's perspective is relevant. The nonbelievers do not believe that the believers really have access to a nonhuman source. If they did, they would be believers. Thus, the nonbelievers think the believers are wrong, not that they have a specially privileged position. Greene also inveighs against the possibility that people might be forced to "accept [religious] revelations uncritically," (which, of course, would violate the Free Exercise Clause), and that laws based expressly on theistic authority would deny the nonbeliever "any real ability to affirm the source of value under which she is being told to live." *Id.* at 541. For reasons I will explain later, I too would be concerned about laws expressly based on theistic authority, but persons might still make arguments for laws in the political sphere that are based on theistic authority without the laws themselves being expressly based on theistic authority. In any event, even if a law were expressly based on theistic authority, I do not believe its flaw would lie in the lack of ability of the nonbeliever to affirm the source of authority under which she is told to live unless the law itself required her to affirm the source of authority upon which it was based. Finally, I do not believe that the justification for a strong Free Exercise Clause depends upon banishing religious argu-

theological assumptions through "reason" rather than a special additional gift would be able to make biblical arguments in the public political realm, while those who think they come to the theological assumptions by faith accompanied by grace would not. That would be a singularly odd basis to determine who can make what arguments in the political realm.

Even if religious arguments were inaccessible to many millions of citizens, the notion that they should be excluded from political discourse makes dubious assumptions about the role of speech in a democratic society. The most basic assumption seems to be that speech must be potentially persuasive to all. Religious speech is said to fail on this assumption because nonbelievers cannot agree with the starting points. In other words, religion is said to be a conversation-stopper. Let us put aside the possibility of conversion, though it is not clear why we should (religious conversions occur every year in large numbers). Even in the absence of conversion, exposure to a religious perspective may spark insights in us that we would not otherwise have entertained. This is always a possibility when we are faced with different perspectives.²² But even if persuasion were not a possibility, the assumption that the possibility of persuasion is a necessary condition for fruitful communication needs justification. Many individuals would want to speak even if they knew they would not be persuasive and even if they knew they would not be understood. Their purpose might be self-expression or expressing what they believe to be God's will regardless of the consequences. They might console themselves with the view that they at least tried or that they got their views "on the record."

Suppose, however, that it is uncivil to present political views that are not intended to persuade. The assumption that public political arguments need to be accessible to everyone cannot be maintained. Suppose I do not speak English; must all start speaking in my language? Suppose my language is Spanish. Should Spanish speaking be excluded from political discourse? Should writings about physics, economics, and chemistry be excluded from political discourse on the ground that they are not "accessible" to the majority of the popula-

ments from the public square. *But see* Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 222 (1992).

22 For a forceful presentation of this contention, compare Jeremy Waldron, *Religious Contributions in Public Deliberation*, 30 SAN DIEGO L. REV. 817, 834-42 (1993) (arguing in support of this contention), with David Hollenbach, S.J., *Contexts of the Political Role of Religion: Civil Society and Culture*, 30 SAN DIEGO L. REV. 877, 890-96 (1993) (arguing for the benefits of religious dialogue in public culture).

tion?²³ Clearly much political discourse is inaccessible to many millions of citizens. Regrettable as it may be that we are not multilingual and broadly knowledgeable, much inaccessible speech richly deserves to be a part of the democratic process.

In the end, the accessibility argument trades on a false picture of the dynamics of democratic deliberation. It imagines democracy as a national debating society in which all citizens "reason together" using a common framework of argument in an atmosphere of total equality. Much of the picture is attractive; certainly we should strive to reduce the enormous inequities of the present system. But even apart from the equality dimension, the picture is wholly false to the dynamics of democratic politics. We live in a pluralistic society. Much public debate is appropriately targeted for an audience smaller than the whole. To declare that debate "uncivil" for its failure to comply with a fictional model substitutes academic dreaming for democratic politics. It is one thing to say we would have a better society if the model of a national debating society were a reality, but it is hard to say that citizens engage in uncivil behavior when they participate in patterns of debate that have been with us throughout the history of the republic and are deeply embedded in our customs, habits, and traditions. Moreover, customs, habits, and traditions are not always wrong. A model requiring communication to all rather than some might give us a slightly improved sense of "togetherness," but it would drastically lower the quality of our public discourse.

So understood, it is hard to understand why the picture of 200 million people reasoning together in a well-ordered society²⁴ should

23 Sometimes the suggestion is made that arguments based on physics are, at least in principle, accessible to all. It is not a meaningful use of the word *principle* so far as I am concerned. I speak only for myself about the sciences, but I believe that many arguments from physics are beyond me and would be no matter how hard I worked at it. With the exception of those religions that would hold us not to be among the elect, I would argue that we may disagree with particular or all religions, but we are in principle capable of being persuaded.

24 As Rawls perceives it, a well-ordered society, among other things, is one in which "everyone accepts, and knows that everyone else accepts, the very same principles of justice . . ." RAWLS, *POLITICAL LIBERALISM*, *supra* note 2, at 35. This, he recognizes, is a highly idealized concept. *See id.*; *see also* RAWLS, Paperback, *supra* note 2, at 384 n.16. On the other hand, Rawls's requirements for an "enduring and secure democratic regime . . . must be willingly and freely supported by at least a substantial majority of its politically active citizens." RAWLS, *POLITICAL LIBERALISM*, *supra* note 2, at 38. Rawls recognizes our present society (however much it might be willingly and freely backed by citizens—a matter about which Rawls is silent) departs from the requirements of justice and the needs of a basic structure as a system of social cooperation. *See* RAWLS, Paperback, *supra* note 2, at 407.

have any grip on our understanding of what is civil in this society.²⁵ We do not live in a well-ordered society, and we never will. Instead of formulating reform strategies with an eye toward a society in which every citizen yearns for justice, we should look upon the society we do have: one divided between the strong and the weak.²⁶ Indeed, it is strongly arguable that the present government has no claim to legitimacy.²⁷ It features an unrepresentative government²⁸ and widespread discrimination, a corrupt electoral system, an unjust criminal "justice" system, and it tolerates widespread denials of adequate food, clothing, health care, jobs, and education. If religious appeals could help in bringing about social change that would mitigate the effects of these injustices, it would be ironic to argue that such claims should be foreclosed in pursuit of a "legitimate" government that at best can only be the product of utopian imagination.²⁹ Apart from the persistently un-

25 I do not mean to demean ideal theory as an academic pursuit; nor do I mean to suggest that it is without practical uses. To some extent, a notion of injustice requires a notion of what a just society might look like (though as a practical matter, that notion might be well short of a blueprint to be satisfactory). I do mean to suggest that the issues of ideal theory do not necessarily track today's political issues. Of course, the general question (beyond the ones discussed in this essay) of how we speak to one another in this society with its mix of just and unjust elements is a live issue. See, e.g., AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996). Gutmann and Thompson rightly recognize (though in my view they could and should have gone further) that: "Even extreme nondeliberative methods may be justified as necessary steps to deliberation [W]hen reasonable perspectives are neglected, there is a strong argument from the premises of deliberative democracy itself to use any legal means necessary to get those views taken seriously." *Id.* at 136. In my view, however, they do not adequately focus on the extent of injustice in society, although it is understandable given the character of their project. If they had focused more on the extent of injustice, they might have placed more emphasis on the importance in civic education of promoting a citizenry prepared to dissent against injustice. See generally SHIFFRIN, *supra* note 8, at ch. 4 (1999). On the perils associated with ideal theory in the race area, see Amy Gutmann, *Responding to Racial Injustice*, in K. ANTHONY APPIAH & AMY GUTMANN, *COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE* 106, 109 (1996).

26 See Judith N. Shklar, *The Liberalism of Fear*, in *LIBERALISM AND THE MORAL LIFE* 27 (Nancy L. Rosenblum ed., 1989) ("For . . . liberalism the basic units of political life are not discursive and reflecting persons, nor friends and enemies, nor patriotic soldier-citizens, nor energetic litigants, but the weak and the powerful."). Regrettably, the weak in some important dimensions, given the power of money in American governments, include the majority of the American people.

27 An unjust society may induce compliance with its regime for prudential reasons, but not because it deserves to be respected.

28 I am thinking primarily of the role of money in politics and the failure to provide proportional representation.

29 To his credit, John Rawls recognizes this. Indeed, he maintains in a much undiscussed footnote that "prior historical conditions may require that comprehen-

just character of the American government,³⁰ I say this because it has *never* been the case that religious appeals³¹ or arguments from non-religious comprehensive views³² have been absent from the public political forum,³³ and there is no reason to believe they ever will be. If a legitimate government depends on the absence of comprehensive views in the public forum, we will never have a legitimate government.

Perhaps it might be argued that steps toward utopia are improvements, and that we should strive to minimize the presence of comprehensive or nonreligious views in the public forum.³⁴ Members of liberal religions, however, would be the only religious believers who would likely be convinced that a principle of excluding religious arguments from the public political sphere made sense.³⁵ Any steps to-

sive reasons be invoked to strengthen [just political] values." RAWLS, *POLITICAL LIBERALISM*, *supra* note 2, at 251 n.41.

30 That many governments are worse does not legitimize this one.

31 I discuss the role of religious arguments *infra* Part III.

32 Arguments from the comprehensive view of utilitarianism are sometimes seen as a regular staple of political life. Although it is commonly argued that utilitarianism is wrong, it is less commonly argued that such argumentation does not appropriately belong in political debate, and when it is, the ferocity seems less than with similar claims about religious argument. See Philip L. Quinn, *Political Liberalisms and Their Exclusions of the Religious*, in *RELIGION AND CONTEMPORARY LIBERALISM*, *supra* note * (author's note), at 138, 144. On the other hand, it might be argued that most arguments from consequences are not clearly advanced from a general comprehensive position, and could, therefore, comfortably fit within the doctrine of public reason. Nonetheless, the hostility directed against the appropriateness of utilitarianism in political debate (as opposed to its political sagacity) seems less fervid than that directed against religion.

33 John Rawls, for example, states that "[t]he idea of public reason with its duty of civility has not yet been expressed in the public culture and remains unknown." RAWLS, *POLITICAL LIBERALISM*, *supra* note 2, at 251 n.41.

34 Although John Rawls's theory is primarily designed for a well-ordered society, he would carry the principle of public reason to a society riddled with injustice. See RAWLS, Paperback, *supra* note 2, at lii (applying the principle of public reason requiring secular reasons to accompany religious reasons to the abolitionists and to Martin Luther King). In earlier work, he applied the principle to an unjust society in a modified way. See Rawls, *supra* note 2, at 765 (noting that abolitionists and Martin Luther King did not go against the ideal of public reason "provided they thought, or on reflection would have thought (as they certainly could have thought), that the comprehensive reasons they appealed to were required to give sufficient strength to the political conception to be subsequently realized").

35 See Alexander, *supra* note 12, at 771 n.26; Quinn, *supra* note 32, at 159. Rawls is confusing to me on this point. He mentions that his theory of political liberalism does not engage those who reject his conception of constitutional democracy. See Rawls, *supra* note 2, at 767. Among other things, to Rawls this includes a conception of reciprocity that conservatives reject and a conception of the individual's moral power to form and maintain a conception of the good without governmental direc-

ward utopia would involve the self-imposed silencing of liberal religious viewpoints, but not others. This might be an improvement for those who are not liberal. But it is hard to see why liberals would regard it as an improvement over the present system.

Thus, the appeal of political liberalism with its confined conception of public reason drastically diminishes so long as conservatives exist in the society.³⁶ If conservatives will not respect the limits of public reason (and they will not), it will be hard to persuade liberals that they should do so. Perhaps some religious liberals will squelch their own self expression, but any gains in fairness and legitimacy seem to be outweighed by obvious unfairness of a different sort.

II. DANGEROUS?

If arguments based on religion are not unfair, perhaps they are dangerous. This argument comes in two forms: first, religious arguments in the public forum³⁷ are divisive and lead to instability; second (less commonly given in the literature, but widely uttered in the academy), religion is a reactionary force.

A. Destabilizing?

Religion, of course, can be a divisive force. So it is in Northern Ireland, the Middle East, and many other spots on the globe. The question whether it is divisive now or has been divisive in the United States is a separate matter.³⁸ In turn, that question hinges in part on

tion and control that is also opposed by conservatives. So conceived, Rawls's political liberalism is a political theory addressed to liberals holding different, comprehensive doctrines. But Rawls also writes that his theory is designed to cover reasonable non-liberal and religious doctrines. See RAWLS, Paperback, *supra* note 2, at xl-xli. My conclusion, which could well be wrong, is that Rawls's case for coverage of these doctrines works to the extent that those doctrines are not conservative. For a provocative perspective on the difficulties of building a case for the liberal toleration of nonliberal cultures beyond a *modus vivendi*, see Robert Justin Lipkin, *Can Liberalism Justify Multiculturalism*, 45 BUFFALO L. REV. 1 (1997); Lipkin, *supra* note 15, at 291 n.117.

36 This argument applies to a strict form of public reason, such as in Rawls's early work or in Greenawalt's work. Rawls's current willingness to permit liberals to criticize "unreasonable" comprehensive views and to introduce their own subject to limitations compliance of which seems fairly easy trades an ability to handle objections like these for a somewhat emaciated doctrine of public reason. See *supra* note 2.

37 It bears emphasis that the concern is about religious arguments in the public forum. Those who think it is uncivil to present religious arguments in political life do not think it is uncivil for religious arguments to be presented outside the political sphere.

38 Whether religion is or is not divisive in particular societies is obviously a contingent matter. That understood, many scholars believe that concerns that religious argument will cause civil strife in the United States are misplaced. See, e.g., PERRY, *supra*

what counts as divisive, or alternatively, when does healthy controversy become unhealthy division? If one believes our society is well-ordered, perhaps concerns about stability deserve a prominent place. But if, as I have suggested, our society is permeated with injustice, perhaps what we need is less stability in order to move us toward justice. Our starting point should be the oft-quoted statement in *New York Times Co. v. Sullivan*:³⁹ We have a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."⁴⁰ It would be peculiar to suppose that we want uninhibited, robust, wide-open debate *except* when religious principles are involved. Despite these constitutional givens, many scholars are rather squeamish about the role of religious debate in political life.

Ordinarily there would be a solid psychological basis for concern. Religion is of vital concern in the lives of people. It represents their best interpretation of the meaning of life. Particularly for those who believe in the doctrine of hell, an enormous amount depends upon their being right in their views. The prominence of other religious views is threatening to those who have a strong psychological stake in being right. The instinct to censor, to stamp out, and to persecute those who differ can be quite strong.⁴¹ Nonetheless, we in the United States need not be terribly concerned about the potentially destabilizing character of religious argument.

First, in order to capitalize on the instinct to censor or to persecute, one would have to change the structure of the Constitution in fundamental ways. One would have to imagine the eradication of the Free Exercise Clause and the Free Speech Clause, not to mention the Establishment Clause. Given the pluralism of religious groups in the United States and the interest in self-protection, it is hard to take seriously any scenario in which those constitutional protections would be removed. In the absence of their removal, the structural barriers to censoring or persecuting other religious believers are quite formidable. Second, many American religions have long adhered to the view that other religions should be tolerated. Indeed, ecumenical move-

note 17, at 53; Quinn, *supra* note 32, at 138, 144; Paul J. Weithman, *Introduction: Religion and the Liberalism of Reasoned Respect*, in RELIGION AND CONTEMPORARY LIBERALISM, *supra* note * (author's note), at 5; cf. Maimon Schwarzchild, *Religion and Public Debate in a Liberal Society: Always Oil and Water or Sometimes Like Rum and Coca-Cola*, 30 SAN DIEGO L. REV. 903, 911 (noting that it is odd to consider religion as a prime threat to tolerance). *But see* Sullivan, *supra* note 21, at 198, 222.

39 376 U.S. 254 (1964).

40 *Id.* at 270.

41 *See* William P. Marshall, *The Other Side of Religion*, 44 HASTINGS L.J. 843 (1993).

ments designed to build bridges between and among churches are sufficiently strong that one might characterize the psychological argument as missing the mark for the overwhelming majority of American religions. In any event, the concern about stability seems substantially overdrawn.

Lurking behind the stability argument, as well as arguments about legitimacy and accessibility, I suspect, is an assumption that substantially more agreement or possibility of agreement is necessary to ground a stable society than I would argue is either necessary, feasible, or desirable. Conflict is an inevitable and permanent part of a democratic society. To hope for widespread agreement even about fundamental aspects of the Constitution is to hope for a different citizenry in the United States. If we are to embrace and celebrate our pluralism, we must be prepared to expect difference and disagreement. Disagreement, even about the Constitution, however, should not lead us to fear for the Nation's stability. I disagree with many aspects of our Constitution, but I am not about to storm the barricades. Acceptance of the Constitution does not require agreement; it only requires a belief that acceptance of it is preferable to violent revolution. A *modus vivendi* is required—nothing more.⁴² At least, that has been our history. We do not, and historically have not, lived in the land of political liberalism. Religious viewpoints have freely been introduced into political life throughout our history. Largely because of our diversity and because of the consequent inability of single groups to take power, we have persisted in stable ways with a *modus vivendi*. The theory that a *modus vivendi* will not be stable is countered by the reality of American history.⁴³ If anything, the country has been too stable. Corporate power in American governments drew immense opposition in the early twentieth century and draws far less now. We need more stirring of the waters, less quiescence, and, if necessary, more instability.

B. Reactionary?

If not dangerously destabilizing, are religious arguments, on balance, reactionary? This concern is rarely expressed in the literature, but it is often the first thing mentioned in conversation. Many liberal

42 For a well-developed argument along these lines, see Robert Merrihew Adams, *Religious Ethics in a Pluralistic Society*, in PROSPECTS FOR A COMMON MORALITY 93, 102–07 (Gene Outka & John P. Reeder, Jr. eds., 1993). For examples of stable societies based on a *modus vivendi*, see MICHAEL WALZER, ON TOLERATION (1997).

43 The Civil War is not a counterexample that helps political liberalism. If the South had had no slavery, it would not have seceded, and we would not have had a civil war. Opposition to slavery does not require a commitment to political liberalism.

or radical intellectuals are simply frightened by religious arguments.⁴⁴ I want to address this argument on its own terms. That is, I am willing to suppose that the political tilt of religious argument could count against it and that right wing arguments are bad for the polity. Both of these assumptions are controversial, but I propose to share them without developing arguments in their support.

The first assumption deserves some discussion, however. Why would anyone be reluctant to argue that the presence of religious arguments in political debates could have deleterious ideological consequences? As I have already suggested, the proponents of confining religious arguments in the public political square are predominantly liberals. Some of them are so Kantian-at-heart that they shrink from consequentialist arguments of any stripe that depend upon a specific social context. They would prefer to argue from principle rather than wading into the shifting and muddy waters of probable effects. Although they would not purport to be indifferent to the political consequences they hope would arise from the political and social institutions they support, they also tend to support one or another version of content neutrality regarding the regulation of political speech. In arguing that religious speech does not belong in the public political square, perhaps a spillover effect from the rhetoric of regulation serves to block ideological arguments. Beyond the Kantian liberals, some pragmatic liberals argue that religion in the public political sphere has the deleterious consequence of threatening stability, but the thrust of this argument is that religion arouses strong feelings, not that its thrust is excessively conservative. The argumentative standpoint is that of the centrist seeking to find a ground from which we can all reasonably argue.

Nonetheless, many of the liberals who distance themselves from ideological argument, in my view, are hostile to religion to begin with and are frightened of the religious right. Without claiming that any hypocrisy is at work, I suspect that if progressives were dominant in religious circles, some of the liberals in this area would be writing about something else.

44 Compare Douglas Laycock, *Freedom of Speech that is Both Religious and Political*, 29 U.C. DAVIS L. REV. 793, 800 (1996) ("The right to make religious arguments does not depend on what conclusions those arguments would support, but assumptions about the tendency of religious arguments seem to underlie much of the debate. The secularists seem to be too driven by particular issues and too prone to associate religious arguments with a small range of political positions they reject."), with STEPHEN CARTER, *THE CULTURE OF DISBELIEF* 48, 99, 265-74 (1993) (asserting that the problem with the religious right is its politics, not that it brings religion into the public square).

That said, let us directly confront the argument that religion in political debate has reactionary consequences. Notice first that it would generally be hard to argue that religious arguments as advanced in public political dialogue have much significant impact. Rather, the worry is that the political spin of religious arguments made in churches, and to a lesser extent in the wider culture, have a negative political impact. The concern seems to be that religious conservatives and their political organizations have negative impacts, rather than the religious arguments they might make. So understood, the primary concern is about the politics of religion;⁴⁵ the secondary concern is about the impact of religious argument in political life.⁴⁶

What is the political tilt of religion in public life? Surely no one would contend that it is straightforwardly conservative, and I do not contend that it has been straightforwardly progressive. Religion has in many circumstances been a double-edged political sword. Nonetheless, I would begin with the historical proposition that progressives have been far more present in political life than religious conservatives.⁴⁷ Although churches⁴⁸ were on both sides of the slavery issue,⁴⁹ the antislavery forces predominated. Some scholars believe that the direct action tactics of the abolitionists influenced progressive movements throughout our history and encouraged those movements to be involved in politics while the Christian right was slumbering in the

45 Apart from the political tilt of religion, most liberals would welcome the cultivation of moral behavior and civic virtue that religion and religious associations tend to promote.

46 Nonetheless, understandably, the literature focuses on the latter rather than the former. To suggest that nonliberal religions lack civility just because they are not liberal is not a concern that specially attaches to religion.

47 Until the 1970s, the main religious lobbies in Washington were liberal. See MICHAEL CORBETT & JULIA MICHAEL CORBETT, *POLITICS AND RELIGION IN THE UNITED STATES* 97 (1999).

48 When I use the term "church," I mean to include members as well, unless otherwise specified. Greenawalt believes it civil for churches to participate in political life giving religious reasons in ways that might be uncivil for believers in some roles, for example, as columnists and vice versa. See GREENAWALT, *supra* note 1, at 174-75 (stating that it is permissible for churches to support moral judgments for religious reasons despite straightforward political implications, but observing that churches should approach making complex policy judgments with caution and should not recommend candidates).

49 On the religious grounding of the abolitionists, see LAWRENCE J. FRIEDMAN, *GREGARIOUS SAINTS: SELF AND COMMUNITY IN AMERICAN ABOLITIONISM 1830-70* (1982); Elizabeth B. Clark, "The Sacred Rights of the Weak": Pain, Sympathy, and the Culture of Individual Rights in Antebellum America, 82 J. AM. HIST. 463 (1995).

private sphere.⁵⁰ Churches also predominated against racial discrimination in the years leading up to the Civil Rights Act of 1964. Of course, churches have hardly led the way in the struggle for women's rights. Indeed, many of them are on the defensive because of their continued failure to recognize the equality of women (others revel in their misogyny).⁵¹ But it should not be forgotten that the struggle for women's rights in this country was initiated by religious women who argued at the Seneca Falls conference that the equality of women "was intended to be so by the Creator."⁵²

Indeed, the Seneca Falls conference was an extension of the temperance movement which was in important ways a battle for women's rights. For example, in the 1830s, according to one study, per capita alcohol consumption was ten gallons per year.⁵³ Since the alcoholic consumption was led by males, it takes little imagination to see the threat to women, not to mention children, posed by the "raw masculinity of frontier America."⁵⁴ Thus, Frances Willard, a major Protestant leader in the temperance movement, tied the campaign to a battle for women's suffrage, not to mention child labor laws and other economic reforms.⁵⁵

Beyond women's rights, religious beliefs have played a strong role in the environmental movement,⁵⁶ but churches have also been on

50 See CHARLES DUNN, *AMERICAN POLITICAL THEOLOGY: HISTORICAL PERSPECTIVE AND THEORETICAL ANALYSIS* 31-34 (1984). Conservative religious groups were involved in the crusade against alcohol that led to prohibition (though progressive groups dominated), but after the repeal of prohibition religious conservatives retreated from politics. See ROBERT BOOTH FOWLER & ALLEN D. HERTZKE, *RELIGION AND POLITICS IN AMERICA* 23 (1995). The belief in an afterlife and the yearning for salvation unquestionably has dulled participation in politics by many churches. At the same time, church organizations have been a major training ground for political action. See SIDNEY VERBA ET AL., *VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS* (1995). Indeed, churches play a significant role in providing civic skills to those who otherwise would lack the resources. It is a vital counterbalance to a system that otherwise tends to produce political participation by the advantaged. See *id.* at 18, 519.

51 For an international perspective on the role of religion in violating the rights of women, see Martha Nussbaum, *Religion and Women's Human Rights*, in *RELIGION AND CONTEMPORARY LIBERALISM*, *supra* note * (author's note), at 93. For a rich study of feminist protest with the Catholic Church, see MARY FAINSOD KATZENSTEIN, *FAITHFUL AND FEARLESS: MOVING FEMINIST PROTEST INSIDE THE CHURCH AND MILITARY* 105-76 (1998).

52 Gerda Lerner, *The Meaning of Seneca Falls: 1848-1898*, *DISSENT*, Fall 1998, at 35.

53 See FOWLER & HERTZKE, *supra* note 50, at 22.

54 *Id.* at 21.

55 See *id.* at 20-21; CORBETT & CORBETT, *supra* note 47, at 100.

56 See Levinson, *supra* note * (author's note), at 82 (citing Al Gore's linking of his environmental views to God and Christ); Nicholas Wolterstorff, *Why We Should Reject*

both sides of what I would call the materialism issue. Corporations may laud the efficiency of capitalism, but many churches have been prepared to criticize its excesses. Indeed, the progressive reform movement, with its support of economic reforms, had strong religious backing from the beginning. For example, the 1912 Progressive Party convention, which called for many democratic (direct primaries, women's suffrage, the initiative) and economic (antitrust, prohibition of child labor, occupational health and safety) reforms, used Onward Christian Soldiers as its theme song.⁵⁷ But, it must be conceded that religion also played a strong role in the rise of the greedier aspects of capitalism,⁵⁸ and the individualistic character of most American churches may have contributed to the United States' woefully weak record on welfare in comparison with other industrialized countries.⁵⁹ Although many churches have argued that government has a responsibility to assist the poor both here and abroad, many churches have taken active steps to help the poor on their own or with other denominations.

If the United States has been woefully weak in supporting the poor, it has been comparatively strong in affording educational opportunities for all in a system of public education. And it should not be forgotten that public education owes its existence to religiously motivated movements. Beyond public education, many of the nation's most eminent institutions of higher learning were founded by churches.⁶⁰

I do not know how to measure the relative quantity of conservative religious argument in the political sphere and that of progressive religious argument.⁶¹ Nor do I know how frequently political self-in-

What Liberalism Tells Us About Speaking and Acting in Public for Religious Reasons, in RELIGION AND CONTEMPORARY LIBERALISM, *supra* note * (author's note), at 162, 180 (referring to views of the Christian Environment Council).

57 See Levinson, *supra* note * (author's note), at 98.

58 For commentary on its relative importance, see R.H. TAWNEY, RELIGION AND THE RISE OF CAPITALISM (1998); MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (1938). See also REINHOLD NIEBUHR, DOES CIVILIZATION NEED RELIGION 67, 95-97, 103 (1927).

59 For a fascinating argument in support of this contention, see SEYMOUR MARTIN LIPSET, AMERICAN EXCEPTIONALISM: A DOUBLE EDGED SWORD 53-76 (1996).

60 See FOWLER & HERTZKE, *supra* note 50, at 7; ALAN RYAN, LIBERAL ANXIETIES AND LIBERAL EDUCATION 74, 78-79 (1998).

61 I do think that liberal intellectuals have generally been slow to credit the role of religion in liberal movements. Consider Wolterstorff's statement:

Many of the movements in the modern world which have resulted in reforms and revolutions that the liberal admires have been deeply religious in their orientation: the abolitionist movement in nineteenth-century America, the

terest predominates over religious inclinations.⁶² I would expect though that arguments to support the status quo (although not in all its particulars) dominate most of the time. The impulse to conform and to go along is quite strong. Of course, the religious right stands outside the conformist mold. Even if conservative religious argument in the political sphere predominated over progressive religious arguments,⁶³ I would still argue that religious argument has a progressive tilt. Consider the state of public argument about most issues of policy. Apart from day-to-day scandals, political talk seems dominated by utilitarian and economic concerns, debates about means-ends rationality, and discussions about the interest in letting us be alone.⁶⁴ Notions that we might have some responsibility and concern for others are subordinate themes in political life if they exist at all. Our right to exploit others seems to be a common assumption in American foreign policy debates so long as it makes us wealthier. To be sure, there is no shortage of religious argument to support the status quo, but religious perspectives frequently buck the egoistic tide. In my view, they are a necessary counterpoint to the corporate state. I do not suggest that they have been especially effective counterpoints to the corporate state. My claim is more of the something-is-better-than-nothing variety.

civil rights movement in twentieth-century America, the resistance movements in fascist Germany, in communist Eastern Europe, and in apartheid South Africa. These movements are regularly analyzed by Western academics and intellectuals as if religion were nowhere in the picture.

Wolterstorff, *supra* note 56, at 162.

As to the strength of the religious right, "only 11% of a national sample admitted to knowing much about the movement and just 9 percent of respondents claimed to think of themselves as members." KENNETH D. WALD, *RELIGION AND POLITICS IN THE UNITED STATES* 245-46 (1997). On the other hand, the religious right has strength beyond its numbers in the Republican party. I believe that constituency was a "but for cause" of the impeachment hearings of President Clinton. I also believe, however, that this action will significantly damage the Republican party.

62 Surely, this was the case in the South on the slavery issue.

63 See VERBA ET AL., *supra* note 50, at 521 (arguing that "the center of gravity of the religious agenda in politics is a conservative concern with a particular focus on advocacy of pro-life views on abortions"); see also *id.* at 19. But there are some indications that this conclusion may have been influenced by their methods of gathering data. As they suggest, when activist participants indicated a concern with welfare or housing, they did not ask whether they wanted more or less governmental involvement and, therefore, could not tell whether the correlation on these issues was liberal or conservative. On the other hand, they did ask for activists' points of view on the abortion question. See *id.* at 470.

64 See Wolterstorff, *supra* note 56, at 177-79.

To be sure, progressives rightly fear the religious right. But I would argue that one does not need a *religion* to become intolerant, mean, and selfish (except about other religions). It might take religion for people to steer an altruistic course. If religion is thought by many to be a positive force in the private lives of many, the same reasons have some force in suggesting that its role in public life is, on balance, positive.

III. ESTABLISHMENT CLAUSE VIOLATION?

Even if religion's role in public life were on balance positive, the question arises whether religiously motivated legislation should be considered in violation of the Establishment Clause.⁶⁵ If religiously motivated legislation violates the Establishment Clause, then it must be uncivil for people to recommend legislation for religious reasons. As I suggested earlier, I believe that to use religious reasons in the whereas clauses of legislation should count as an Establishment Clause violation. To do so ordinarily would amount to imposing sanctions or extracting taxation in the name of religion or otherwise formally endorsing religion. But to stop short of formally employing religious reasons or religious content in legislation or government action does not involve a violation of the Establishment Clause. My point is not that you may have religious motivation so long as you are not stupid enough to make your motivation clear. My point is that you may have religious motivation so long as you are not stupid enough to violate the Establishment Clause by enshrining your motivation into a formal governmental statement. To be more precise, my claim is that legislation does not violate the Establishment Clause when: (1) it has a secular purpose;⁶⁶ (2) it does not otherwise violate the Establishment Clause because of its religious content;⁶⁷ (3) it does not contain a reli-

65 My colleague Gary Simson has argued that laws should be invalidated if they "would not have been adopted if a nonsecular purpose had not been considered." Gary J. Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 CORNELL L. REV. 905, 910 (1987). See also Daniel O. Conkle, *Religious Purpose, Inerrancy, and the Establishment Clause*, 67 INDIANA L.J. 1 (1991) (asserting that religious purpose is sometimes unconstitutional, and sometimes not).

66 I will bracket difficult questions about pretextual purposes for later writing.

67 I recognize that the determination of what counts as religious content or religious symbolism can be difficult. See, e.g., William P. Marshall, "We Know it When We See It": *The Supreme Court Establishment*, 59 S. CAL. L. REV. 495 (1986). I certainly would not take the Supreme Court decisions on these issues as my normative guide. In my view, for example, *Lynch v. Donnelly*, 465 U.S. 668 (1984), which held that inclusion of a creche in a city display with secular symbols does not violate the Establishment Clause, is an unqualified outrage. See also William Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall*, 1984 DUKE L.J. 770.

gious reason in its whereas clause,⁶⁸ and even when (4) it was motivated by religious considerations as a "but for" cause of its passage.⁶⁹

68 With possible exceptions I will slide past here, I believe that religious reasons should not be an official basis for government action. State declarations of religious reasons should be deemed to be a violation of the Establishment Clause whether they be whereas clauses in legislation or a passage in a majority court opinion. The question of remedy in the latter situation may be difficult, but I would contend that judges take an oath to defend the Constitution and take an oath not to rely on religious reasons in opinions of the court. A requirement of official secular defense, however, need not entail a requirement of secular motivation. It is, of course, arguable that judges should not be relying on their own moral views, but should instead be interpreting, when relevant, the morality of the society, but I shall not enter that thicket here. See Richard H. Fallon, Jr., *Of Speakable Ethics and Constitutional Law: A Review Essay*, 56 U. CHI. L. REV. 1523 (1989).

Whether legislators should be able to express religious motivation may depend upon the context. Clearly, if there is a tangible risk that their expression will be seen as evidencing religious purpose for the legislation with secular purpose as a pretext, they should not express religious motivation. In the absence of such a risk (imagine the expression of religious motivation for a murder statute), they should feel free to do so. Of course, most will not do so except in the most general way because of the relative political risks and benefits. Apart from the political tilt of religion, most liberals would welcome the cultivation of moral behavior and of civic virtue that religion and religious associations tend to promote. As Rawls perceives it, a well-ordered society, among other things, is one in which "everyone accepts, and knows that everyone else accepts, the very same principles of justice" RAWLS, *POLITICAL LIBERALISM*, *supra* note 2, at 35.

69 For example, a statute mandating a moment of silence in public schools at the outset of the day might be defended on secular grounds, but such a statute ordinarily would not be passed without religious instigation and support. Under the perspective which I follow, such a statute would be constitutional. See *Bown v. Gwinnett County Sch. Dist.*, 112 F.3d 1464 (11th Cir. 1997). On the other hand, the statute in *Wallace v. Jaffree*, 472 U.S. 38 (1985), where a moment of silence statute requiring one minute for meditation at the outset of the day was amended to provide for meditation *or voluntary prayer*, was properly declared unconstitutional, in my view. I will not, however, dwell upon the extent to which my views track those held by the Supreme Court. Compare Simson, *supra* note 65, at 909 ("[I]t seems clear that, unless a law is proven to be predicated entirely or almost entirely on nonsecular purposes," no establishment clause objection based on purpose will prevail.), and Laycock, *supra* note 44, at 811 ("[The] legislature [must] have some actual secular purpose; it may also have religious purposes, and the religious purposes might even be dominant, so long as there is some secular purpose."), with Sanford Levinson, *Religious Language and the Public Square*, 105 HARV. L. REV. 2061, 2071 (1992) (book review) ("In light of existing Supreme Court precedent, it is doubtful that a law motivated in fact by religious considerations could withstand Establishment Clause scrutiny simply because it arguably furthers an articulable secular public purpose."). Some of the relevant cases include *Edwards v. Aguillard*, 482 U.S. 578 (1987) (invalidating law forbidding the teaching of evolution in public school without also teaching "creation science"); *Wallace*, 472 U.S. at 38 (invalidating law authorizing a period of silence in public schools specifically for meditation and voluntary prayer); *Stone v. Graham*, 449 U.S. 39 (1980) (invalidating

Because I do not want to unduly lengthen this Article, my goal is to give some indication as to how this claim might be supported rather than to offer an extended brief for it. Many have argued for different perspectives on the Establishment Clause; I propose merely to assert a partial perspective here and seek to apply it.

The Establishment Clause is supported by multiple reasons: it is a prophylactic measure that protects religious liberty;⁷⁰ it stands for equal citizenship without regard to religion;⁷¹ it protects churches from the corrupting influences of the state;⁷² it protects the autonomy of the state;⁷³ it protects taxpayers from being forced to support religious ideologies to which they are opposed;⁷⁴ it promotes religion in the private sphere;⁷⁵ and it also protects against the destabilizing influence of having the polity divided along religious lines.⁷⁶ If, for exam-

required posting of Ten Commandments on public school walls); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (invalidating law prohibiting the teaching of evolution in public schools).

70 This aspect of the Establishment Clause is emphasized in JESSE H. CHOPER, *SECURING RELIGIOUS LIBERTY* (1995) and Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1985-1986).

71 This follows from the position articulated by Justice O'Connor that any endorsement of religion is invalid because it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring); *County of Alleghany v. ACLU*, 492 U.S. 573 (1989) (Blackmun, O'Connor, & Stevens, JJ.); see also William W. Van Alstyne, *What is "an Establishment of Religion"?*, 65 N.C. L. REV. 909, 914 (1987); cf. Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245 (1994) (applying an equality analysis to free exercise issues).

72 This was the special concern of Roger Williams. See ISSAC KRAMNICK & R. LAURENCE MOORE, *THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS* 46-66 (1996); EDMUND S. MORGAN, *ROGER WILLIAMS: THE CHURCH AND THE STATE* (1967); see also Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1181-82 (1988); Van Alstyne, *supra* note 71, at 914-15.

73 See *Lemon v. Kurtzman*, 403 U.S. 602, 623 (1971).

74 See LEONARD LEVY, *THE ESTABLISHMENT CLAUSE* (1994); Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DEPAUL. L. REV. 373, 373-74 (1992).

75 This has been an effect of the clause, see FOWLER & HERTZKE, *supra* note 50, at 10-11, but I doubt the workings of this aspect were foreseen even though there is substantial reason to believe the framers would have welcomed it. See also JOHN H. GARVEY, *WHAT ARE FREEDOMS FOR?* (1996) (asserting that religious freedom is protected because religion is a good thing); Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 153-66 (1991).

76 See *Lemon*, 403 U.S. at 622-24 (1970); Ira C. Lupu, *To Control Faction and Protect Liberty: A General Theory of the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 357, 360 (1996); Sullivan, *supra* note 21.

ple, the Lutheran Church were established in Minnesota,⁷⁷ discrimination against non-Lutherans would be encouraged and non-Lutherans would rightly regard themselves as second class citizens;⁷⁸ the Church might be pressured to support state initiatives of which it would otherwise steer clear. The state might be pressured to adopt measures about which it would otherwise remain neutral, and non-Lutheran taxpayers would be forced to support a church to which they were ideologically opposed. The incentives to form non-Lutheran religions would be diminished, and a destructive fight to oust the Lutheran Church would be ongoing with recriminations on all sides.

Religiously motivated legislation touches on many of these concerns, but in far less substantial ways. I ask my classes if, apart from other constitutional considerations, a law criminalizing abortion should be invalidated on Establishment Clause grounds if a crucial part of its passage has been religious support. My classes overwhelmingly say "yes." They quickly reconsider, however, when I ask them this question: Assume that a crucial cause of the passage of the 1964 Civil Rights Act was the support of religious groups making religious arguments.⁷⁹ Should the 1964 Civil Rights Act be struck down on establishment grounds? Suppose the same for religious abolitionists and the abolition of slavery.⁸⁰

A religiously motivated civil rights act or a religiously motivated anti-abortion statute⁸¹ implicates some, but not all, of the Establish-

⁷⁷ Of the seven states establishing religion at the time of the adoption of the Bill of Rights, none of them established a single church. They all, in one way or another, provided for multiple establishments. See LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE* xxii (1993).

⁷⁸ One might think the non-Mormons in Utah already think of themselves as second class citizens because of the dominant place of the Mormon Church in the culture of Utah. In a sense, however, such an observation would miss the central point of this section. It is one thing to live in a culture in which one perceives oneself as an outsider (as do non-Mormons in Utah or Jews in the United States at large). It would be quite another for Utah to formally proclaim the Mormon Church as the established church or for the United States to formally declare itself to be a Christian nation. Second class citizenship would then be official government policy.

⁷⁹ The assumption is not unreasonable. Both opponents and supporters of the legislation agreed that the churches' involvement was crucial to its passage. See A. JAMES RECHLEY, *RELIGION IN AMERICAN PUBLIC LIFE* 248 (1985).

⁸⁰ Suppose it turned out that most provisions of a state's quite ordinary penal code were thought by citizens to be primarily justified for religious reasons. Would such a code violate the Establishment Clause?

⁸¹ I would invalidate such a statute on due process or equal protection grounds, but not on religion clause grounds.

ment Clause concerns.⁸² Neither seems to imperil the free exercise of religion nor interfere with the function of the Establishment Clause in promoting private religions. They do not threaten churches with the corrupting influence of the state, nor do they force taxpayers to support religious ideologies to which they are opposed. (They are motivated by ideology, but they are not ideology.) To be sure, they risk the destabilizing influence of having the polity divided along religious lines, but as I suggested earlier, one person's destabilizing influence is another person's freedom of speech. More serious is the argument that the passage of such laws will leave some with the impression that they are outsiders—that they are not equal citizens.⁸³ To put it another way, the presence of religion in the debate has an impact on the social meaning of the legislation.⁸⁴ I regard this as a serious point, but I think it is sufficiently mitigated by the requirements of a secular purpose and by the absence of direct religious content. Finally, one might ask whether such laws interfere with the autonomy of the state to protect the public interest. This merely restates the question to be decided. In what sense should the state be autonomous? Clearly, in a pluralistic society, the state should certainly be free from the influence of an established church for all of the reasons mentioned. But, in a pluralistic society, it is precisely my point that churches and believers should be able to weigh in on controversial public questions. To counsel against their input is to betray the principles of liberalism, not to support them.

82 My colleague Gary Simson suggests the appropriate focus is the cumulative effect of such statutes rather than the effects in specific instances. The same kind of argument was put forth to authorize the regulation of commerce in *Wickard v. Filburn*, 317 U.S. 111 (1942). I think the force of Professor Simson's concern, however, is dulled by the fact that I am discussing government actions without religious content and by the pluralistic character of religions in American society.

83 At the same time we should not fool ourselves, for this culture regularly reminds non-Christians that they are not equal citizens. See, e.g., STEPHEN FELDMAN, *PLEASE DON'T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY OF THE SEPARATION OF CHURCH AND STATE* (1997).

84 See Abner S. Greene, *The Political Balance of the Religious Clauses*, 102 YALE L.J. 1611, 1628. (1993).